

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

In re Application of:) U.S. Patent No: 7,563,471
James H. Keithly)) Issue Date: July 21, 2009
Application No. 10/784,855)) Examiner: Trinh T. Nguyen
Confirmation No. 9428)) Art Unit: 3644
Filed: February 23, 2004))
For: COMMERCIAL POULTRY BREEDER)
CITRUS BYPRODUCT FEED SUPPLEMENT)
AND METHOD)

APPLICATION FOR PATENT TERM ADJUSTMENT UNDER 37 C.F.R. § 1.705

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Commissioner for Patents
P.O. Box 1450
Alexandria, VA 22313-1450

Sir:

Applicant respectfully applies and/or petitions for reconsideration under 35 U.S.C. § 154 and 37 C.F.R. § 1.705(d) of the patent term adjustment indicated on the face of the above-identified U.S. Patent No. 7,563,471 (“the Patent”) issued from the above-identified application.

Applicant notes that the present request has been filed within the 180 day time limit from the issue date of the Patent set forth in 35 U.S.C. § 154(b)(4), because January 17, 2010, (exactly 180 days) falls on a Sunday and January 18, 2010, falls on a Federal Holiday (Dr. Martin Luther King, Jr. Day). Additionally, Applicant notes that, under 37 C.F.R. § 1.705(d), no issues have been raised in this request that were raised, or could have been raised, in an application for patent term adjustment under § 1.705(b), because the error in patent term adjustment is based on the issue date of the Patent, which was not

known before payment of the issue fee, and because the recent decision in *Wyeth and Elan Pharma v. Kappos* (Fed. Cir., January 7, 2010) changed U.S.P.T.O. policy regarding calculation of patent term adjustments.

The Patent indicates a term adjustment of 209 days. However, Applicant respectfully submits that such a determination is not correct under 37 C.F.R. 1.702-1.705 and that the proper term adjustment in this case should include both the sum of the periods under both §§ 1.703(a) and 1.703(b), according to *Wyeth v. Kappos*.

Statement of Pertinent Facts

1. The application was filed on February 23, 2004.
2. Fourteen (14) months after filing the application was April 23, 2005.
3. The first office action was mailed March 6, 2006.
4. The date three years after filing was February 23, 2007.
5. The Patent issued on July 21, 2009.
6. A request for continued examination (RCE) was filed October 31, 2007.
7. The above-captioned application is subject to a terminal disclaimer with respect to U.S. Patent No. 7,115,298, which has the same effective filing date as the present application for purposes of patent term, and which lists a patent term adjustment of 345 days.
8. The total extension periods used by Applicant total 113 days at most.
9. There was no overlap in the time periods:
 - a. Between April 23, 2005, and March 6, 2006 (i.e., 14 months from the filing date and the mailing date of the first office action), and
 - b. Between February 23, 2007 (i.e., three years from the filing date of the application), and the issue date of the Patent.

REMARKS

The 209 days Patent Term Adjustment (PTA) indicated on the face of the Patent appears to take into account to the number of days that the mailing of the first office action was delayed beyond 14 months from the filing date, as well as the extension periods used by Applicant. However, the PTA ignores 37 C.F.R. 1.703(b), i.e., the number of days beyond three years from the filing date that the application will issue into a patent, which was 879 days beyond three years after filing the application. Under the recent decision in *Wyeth and Elan Pharma v. Kappos* (Fed. Cir., January 7, 2010), both the delay under 1.703(a) and 1.703(b) must be factored into the patent term adjustment, unless those periods directly overlap with each other. In this case, there was no such direct overlap, as indicated in point (9) above.

Applicant recognizes that under 37 C.F.R. 1.703(b)(1), the patent term adjustment may be reduced based on the filing of the RCE on October 31, 2007, which was filed 250 days beyond February 23, 2007 (three years after filing the application). As a result, Applicant is entitled to an additional PTA of at least the additional 250 days between February 23, 2007 and the RCE filing on October 31, 2007.

Applicant also recognizes that the patent term adjustment may be limited to the 345 day patent term adjustment listed in U.S. Patent No. 7,115,298, due to the filing of a terminal disclaimer in this application with respect to the '298 patent.

CONCLUSION

Thus, the Patentee hereby requests reconsideration of the PTA listed on the face of the Patent and revision of the PTA by at least an additional 250 days, to a total of at least 459 days, or revision at least to the total of 345 days listed in the '298 patent. The Office is authorized to charge any requisite fee for this paper to our Deposit Account No. 19-0733.

Respectfully submitted,

BANNER & WITCOFF, LTD.

Date: January 19, 2010

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